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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JUAN R. GONZALEZ, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

PHILIP L. SUNDEL
Lieutenant, Judge Advocate
General's Corps
U.S. Naval Reserve
Counsel of Record

STEVEN P. HAMMOND
Major, U.S. Marine Corps

NAVY-MARINE CORPS APPELLATE
DEFENSE DIVISION
Washington Navy Yard
Washington, D.C. 20374-1111
(202) 433-4161

RUTH G. FINN
1827 West Clairmont
Phoenix, Arizona 85015

39 pp

QUESTION PRESENTED

IS A MILITARY DEFENDANT ENTITLED TO THE SAME RIGHT OF EXPERT ASSISTANCE IN PREPARATION OF HIS DEFENSE AS A FEDERAL CIVILIAN DEFENDANT?

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OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Gonzalez*, 39 M.J. 459, (C.M.A. 1994), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Gonzalez*, No. 88 4472 (N.M.C.M.R. 1992), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on June 23, 1994. Title 28 U.S.C. § 1259(3) provides

jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

STATEMENT OF THE CASE

Petitioner was charged with the premeditated murder of his wife, in violation of Article 118, Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 918. The case was referred to trial with the death penalty authorized. Prior to trial, Petitioner requested that he be provided with a Government-employed investigator to aid in the preparation of his defense.[1] In support of his request, Petitioner argued that the 17 criminal investigators working for the Government refused to inquire into potentially exculpatory evidence which the defense had identified. The request for expert assistance was denied by both the Convening Authority (the officer responsible for Petitioner's prosecution and vested with the authority to grant or deny such requests), and, on review, the military trial judge.

Petitioner was found guilty of the premeditated murder of his wife. Petitioner was sentenced to the mandatory minimum authorized punishment of confinement for life, discharge from the Naval Service with a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the lowest enlisted paygrade.

The Navy-Marine Corps Court of Military Review affirmed the findings and sentence. *United States v. Gonzalez*, No. 88-4472 (N.M.C.M.R. October 26, 1992). In its unpublished opinion, the Navy-Marine Corps Court of Military Review affirmed Petitioner's conviction, *inter alia*, on the ground that Petitioner had failed to demonstrate the necessity of the requested investigator.

On appeal, pursuant to Article 67, U.C.M.J., 10 U.S.C. § 867(a)(3), the Court of Military Appeals affirmed Petitioner's conviction and sentence. *United States v. Gonzalez*, 39 M.J. 459 (C.M.A. 1994). The Court of Military Appeals held that Petitioner had failed to demonstrate the necessity of the requested

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[1] At the time of Petitioner's trial the Naval Investigative Service, the criminal investigative agency of the United States Navy, was willing to provide an investigator to a criminal defendant, on a confidential basis, if ordered to do so.

investigator.

REASONS FOR GRANTING THE WRIT

Military defendants are entitled to the same due process rights as their federal civilian counterparts, absent a legitimate military reason for disparate treatment. Despite this principle, military defendants are denied necessary assistance in circumstances where it would be provided to federal civilian defendants. This disparate treatment cannot be justified by military necessity, is contrary to Congressional intent, and denies military defendants due process.

I. The application of the "necessity test" to requests for expert assistance in the military denies a defendant due process and the fair opportunity to present his defense.

The Due Process Clause of the Fifth Amendment requires that a defendant have access to necessary expert assistance. *See generally Ake v. Oklahoma*, 470 U.S. 68 (1985). In *Ake*, this Court addressed the issue of when a state must provide a criminal defendant with access to a psychiatrist's assistance in the preparation of his case. The Court held that

> [w]hen the defendant is able to make an *ex parte* showing to the trial court that his sanity is likely to be a significant factor in his defense . . . the State must, at a minimum, assure the defendant access to a competent psychiatrist who will . . . assist in evaluation, preparation, and presentation of the defense.

Id. at 82. While this Court has never explicitly expanded the holding in *Ake* beyond requests for psychiatric assistance, it has been applied by the lower federal courts to requests for other types of expert assistance. *See Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987); *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986); *c.f. Stephens v. Kemp*, 846 F.2d 642 (11th Cir. 1988); *Ford v. Seabold*, 841 F.2d 677 (6th Cir. 1988); *Moore v. Kemp*, 809 F.2d 702 (11th Cir. 1987), *cert. denied*, 481 U.S. 1054 (1987).

The *Ake* court ruled that when a defendant has demonstrated the "probable value of the . . . assistance sought," and has shown that the expert's testimony is "likely to be a significant factor at trial," then he is entitled to the requested expert assistance. *Ake*, 470 U.S. 74, 78, 82. The Court summarized the test as weighing

> the private interest that will be affected by the action of the State . . . the governmental interest that will be affected if the safeguard is to be provided . . . [and] the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

Id. at 78.

Indeed, even before *Ake*, the considerations which subsequently led to that opinion caused this Court to hold that a defendant in a "quasi-criminal" proceeding cannot be denied access to necessary scientific tests if he cannot himself afford them. *Little v. Streater*, 452 U.S. 1 (1981) (cited in *Ake*, 470 U.S. at 78). In *Ake*, this Court summarized its approach to the issue of access to expert assistance by stating that "[m]eaningful access to justice has been the consistent theme of these cases." *Ake*, 470 U.S. at 78.

The military courts have acknowledged that *Ake* and the Due Process Clause of the Fifth Amendment require that a military defendant be provided with necessary expert assistance. *Garries*, 22 M.J. at 290-91. Such application of *Ake* to the military is consistent with this Court's holding that, absent circumstances of a uniquely military nature, the Due Process Clause provides the same protection to servicemembers as it does to civilians. *See Weiss v. United States*, 114 S. Ct. 752, 760-61 (1994), and cases cited therein. The way in which the *Garries* necessity test is applied to requests for expert assistance in the military, however, is substantially different from how it is applied in the federal civilian system, and results in most case in the denial of the right to necessary expert assistance, and the denial of due process.

In the military system, *Garries* and Rule for Courts-Martial

(R.C.M.) 703(d), Manual for Courts-Martial, 1984, establishes the procedures for obtaining Government-funded expert assistance. R.C.M. 703(d) requires that the defense first submit a request for expert assistance to the convening authority, explaining why the requested expert is necessary. If the convening authority denies the request, it may be renewed before a military judge, who will also look for a showing of necessity. R.C.M. 703(d); *Garries*.

Although both the military and civilian federal courts apply a necessity test, the test in the military system, unlike the *Ake* test, does not focus on the probable value of the requested expert assistance, but instead requires that a defendant conclusively prove that the expert's testimony will be a significant factor. Thus, the test has proven to be nearly impossible to satisfy. *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994); *United States v. Metcalf*, 34 M.J. 1056 (A.F.C.M.R. 1992), *petition granted*, 40 M.J. 35 (C.M.A. 1994); *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991), *cert. denied*, 112 S. Ct. 1473 (1992); *United States v. Mann*, 30 M.J. 639 (N.M.C.M.R. 1990), *petition denied*, 32 M.J. 45 (1990); *United States v. Tornowski*, 29 M.J. 578 (A.F.C.M.R. 1989); *United States v. Kinsler*, 24 M.J. 855 (A.C.M.R. 1987), *pet denied*, 27 M.J. 21 (1988). A showing of what the defense has reason to believe will be produced is rarely enough. *Gonzalez*, 39 M.J. 459; *Robinson*, 39 M.J. 88; *United States v. Tharpe*, 38 M.J. 8 (C.M.A. 1994); *Metcalf*, 34 M.J. 1056; *Allen*, 31 M.J. 572; *Mann*, 30 M.J. 639; *Tornowski*, 29 M.J. 578; *Kinsler*, 24 M.J. 855.

In Petitioner's case the application of the *Ake* necessity test would have resulted in the granting of Petitioner's request. The private interest which was in question was clear -- Petitioner's freedom, and perhaps his life. Similarly, the Governmental interest that would be affected was also clear, and fairly insignificant -- the cost of one more investigator, in a case where the prosecution was already employing at least 17 investigators. Or, on a wider scope, the cost to the Government would be the limited financial burden of providing defense investigators in those few cases where a defendant successfully shows necessity. *See Ake*, 105 S.Ct. at 1094. Further, both the probable value of the requested expert, and the risk of an erroneous deprivation of Petitioner's life and liberty if the expert were denied, were quite significant. Petitioner

identified several potentially exculpatory lines of inquiry which the Government investigators knew about, but refused to pursue. Thus, whole areas of potentially exculpatory evidence were not investigated because the request was denied. *Gonzalez*, 39 M.J. at 460.

The issues pointed to by Petitioner in support of his request included the question of whether the victim was seen after the time that the Government claimed she died. Evidence indicated that the victim died sometime during a 72 hour period, App. B at 8a, yet Petitioner's presence was unaccounted for during only four of those 72-hours, and the Government's case absolutely required the victim to have died during those four hours. Two other vital questions left unanswered by the Government investigation, and pointed to by Petitioner, were who supplied the significant quantities of codeine and cocaine found in the victim's body, and who was with her when she ingested them? *Gonzalez*, 39 M.J. at 460. These matters were of overwhelming significance, because the drugs were apparently ingested after the time during which the Government's case required her to have been dead, and the victim's lover was a known drug dealer. *Id.* at 460; App. B at 12a. Additionally, there was the question of why, prior to being murdered by being shot with a crossbow, the victim and her lover had gone to a sporting goods store looking for crossbow bolts. *Gonzalez*, 39 M.J. at 460. The Government investigators never even questioned the owner of the sporting goods store, as they never questioned the local national who found the victim's body. Finally, there was evidence that the murder might have occurred in the course of the victim being robbed, yet the Government investigators refused to investigate whether there were any witnesses to, or persons knowledgeable of, the apparent robbery.

An investigative expert working for the defense would have questioned the several potential witnesses known to the Government, but not questioned by the Government investigators, who may have had information regarding the murder, the robbery, or the drugs. The Government's case was built on circumstantial evidence, all of which absolutely required that the above questions be answered in certain ways. Correct answers to these questions were necessary before appellant could receive a fair trial. The Government investigators, however, were not looking for these

answers, and refused to look into any of the areas identified by Petitioner as being possible leads towards exculpatory evidence. Petitioner's defense attorneys were incapable of conducting such an investigation themselves because they were untrained in the area of criminal investigation, were unfamiliar with the local criminal culture, and did not speak Spanish, the local language.[2] Consequently, the only way that the potentially exculpatory information identified by Petitioner was going to be investigated was if Petitioner was provided with the services of an investigator.

Thus, since "a fair trial in a fair tribunal is a basic requirement of due process," *Weiss*, 114 S. Ct. at 761 (citation omitted), and since the investigation into these areas was necessary for a fair trial, petitioner was entitled to the requested assistance. The Due Process Clause and *Ake* required that Petitioner's request for assistance be granted.

This showing of necessity, however, was found to be insufficient by the lower courts. Instead of being satisfied that Petitioner had shown the probable value of the requested assistance, the courts below held that Petitioner should have provided conclusive proof, prior to the investigation, that the investigator would discover exculpatory evidence. *See Gonzalez*, 39 M.J. at 460; App. B at 10a-12a. Specifically, the Court of Military Appeals stated that the *Garries* necessity test applied, then quoted, apparently with approval, the trial judge's conclusion that "the defense sought 'a broad generalized investigation' without any evidence that particular evidence existed." (emphasis added). *Gonzalez*, 39 M.J. at 460. Under the test used by the court, in order for Petitioner to show necessity, he must show what the results of the requested expert assistance will be, before that assistance is provided. This is a much stricter test than *Ake*, and as demonstrated by its application in Petitioner's case it is almost impossible to satisfy. The obvious problem with such a test is that Petitioner was in no position to produce conclusive proof that particular evidence existed without the assistance of the requested investigator. Just as the Government needed 17 investigators to work on its case, Petitioner needed investigative assistance as well.

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[2] Both the murder and Petitioner's trial occurred in Rota, Spain.

Unfortunately, however, under the military courts' application of the necessity test, Petitioner needed the expert assistance to be able to make a showing that he needed the assistance. Such a circular test is something which only a character out of CATCH-22 should feel comfortable with.

Essentially, the *Garries* necessity test has made a showing of necessity an almost insurmountable obstacle to obtaining investigatory assistance. This split in the application of the necessity test between the civilian and military federal courts has resulted in disparate treatment between civilian and military defendants. Such disparate treatment denies military defendants due process.

Further, even if the different test applied in the military is not almost impossible to satisfy, it is at best substantially more difficult to satisfy than *Ake*. There is, however, no reason for there to be a different test in the military in the first place. As this Court has held in the past, the only time that a military defendant is not entitled to the same due process rights as a civilian is when "the delicate test of balancing the rights of servicemembers against the needs of the military . . . " shows that different treatment is necessary. *Weiss*, 114 S. Ct. at 761. No such "needs of the military" exist in Petitioner's case. The right to expert assistance at trial does not impinge the military's ability to maintain good order and discipline, nor does it adversely impact morale.[3] Providing such assistance, after an *Ake*-style showing of necessity, would not inhibit the military mission, nor would it be unreasonably burdensome.[4]

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[3] If the reason for the government's opposition to Petitioner's request was merely cost and administrative convenience, as it appears to have been, that reason cannot justify such disparate treatment. *C.f. Frontiero v. Richardson*, 411 U.S. 677 (1973) (administrative convenience insufficient to justify gender-based discrimination in determination of military dependency status).

[4] Indeed, the government cannot argue that providing Petitioner the requested expert would have been overly burdensome, because at trial Petitioner was informed that the Naval Investigative Service would willingly provide him with a confidential investigative expert, if ordered

Indeed, if Petitioner's case shows anything it shows why there usually will not be a valid military reason for a different test. Petitioner was not stationed in a remote location, but rather, like the majority of servicemembers, was stationed at a large base. Petitioner, in fact, was stationed at one of the largest naval bases in Europe. The crime and all of the pretrial and trial procedures took place during peacetime, so there was no military need for a particularly rapid investigation or trial. Finally, there was obviously no shortage of trained investigators available, since the Government used at least 17 to prepare its case.

The *Ake* test is the due process "floor". By definition any stricter test provides something less than due process, and can be justified only if there is a valid military need for a different test. In Petitioner's case, there was no such valid need. Given that "men and women of the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service," *Weiss*, 114 S. Ct. at 769 (Ginsburg, J., concurring), Petitioner should have had the same right to expert assistance that a federal civilian defendant would have had. By applying a more difficult test than *Ake*, the lower courts denied Petitioner due process.

II. The split between the federal civilian and military courts over the standard to be applied to requests for expert assistance violates Congressional intent that military and federal civilian defendants be treated similarly when possible.

Congress intended that the military criminal system operate similarly to that of the federal civilian system whenever possible. As stated in Article 36, U.C.M.J., 10 U.S.C. § 836, Congress provided that

> [p]retrial, trial, and post-trial procedures . . .

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to do so, and Petitioner was even told the name of the expert who would be provided.

> may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

Further, Congress directed in Article 46, U.C.M.J., 10 U.S.C. § 846, that "[p]rocess issued in court-martial cases . . . to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue . . . ." As this Court recently acknowledged, Congress has explicitly manifested its intent in this regard. *See Weiss*, 114 S. Ct. at 762 ("Congress has taken affirmative steps to make the system of military justice more like the American system of civilian justice").

A criminal defendant in the federal courts is afforded the opportunity to request and to obtain investigative assistance pursuant to the Criminal Justice Act (the CJA), 18 U.S.C. § 3006A (e). Similarly, a military defendant may obtain expert assistance pursuant to R.C.M. 703(d). By enacting similar provisions for the obtaining of expert assistance, Congress indicated its desire that military and federal civilian defendants have equal access to necessary expert assistance.

Further, the Court of Military Appeals has tacitly acknowledged that the same standard should apply. That court has stated that even though the CJA does not apply to the military, the federal courts' application of § 3006A (e) to requests by civilians is useful guidance in applying R.C.M. 703 to requests in the military. *Garries*, 22 M.J. at 290. In practice, however, the lower court's acknowledgment of the similarities between these two provisions has not translated into a similar standard of review of requests for expert assistance. Indeed, the *Garries* necessity test has proven to be almost impossible to satisfy.

The standard for evaluating necessity in the federal system, on the other hand, has been more liberally applied. *Allen*, 31 M.J. at 623. In the federal system, the defendant must show only that there is a reasonable probability that the expert

assistance will be useful in preparing or presenting the defense. *See United States v. Patterson*, 724 F.2d 1128 (5th Cir. 1984); *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980); *United States v. Durant*, 545 F.2d 823 (2d Cir. 1976); *United States v. Bass*, 477 F.2d 723 (9th Cir. 1973); *United States v. Theriault*, 440 F.2d 713 (5th Cir. 1971), *appeal after remand*, 474 F.2d 359 (5th Cir. 1973), *cert. denied*, 411 U.S. 984 (1973); *United States v. Schultz*, 431 F.2d 907 (8th Cir. 1970), *appeal after retrial*, 431 F.2d 907 (8th Cir. 1970), *cert. denied*, 416 U.S. 988 (1974). Defendants in federal courts are not required to detail the results of the requested assistance prior to that assistance being made available. Federal courts do not apply the necessity test the same way that it is applied in the military. Therefore, federal civilian defendants do not face the insurmountable obstacle presented to military defendants.

As was intended by Congress, there are similar rules for providing both military and civilian federal defendants with expert or investigatory assistance. However, the manner in which these rules are applied in each system is very different.[5] This difference cannot be justified by military necessity. There is nothing about the needs of the military which require that the test for expert assistance be applied so much more stringently to military defendants then it is to federal civilian defendants.

The disparate application of the necessity test between the military and the federal courts results from the split between the jurisdictions over the application of this fundamental right to present a defense. However, "[a] member of the Armed Forces is entitled to equal justice under law . . . as written in the Constitution." *Weiss*, 114 S. Ct. 769 (Ginsburg, J., concurring). As this split cannot be justified by military necessity, and is contrary to Congressional intent that all federal defendants be

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[5] This inconsistency is further highlighted by the manner in which such requests are made. Due process requires that such requests in the federal system be made by *ex parte* motion. *Ake*, 470 U.S. 1096; 18 U.S.C. 3006(A) (e). In contrast, the court below has stated that, except in the most unusual situation, such motions in the military must be made in open court, so as not to allow the defense an "undue advantage". *Garries*, 22 M.J. 291.

treated similarly when possible, military defendants are entitled to the same right of expert assistance in the preparation of their defense as are federal civilian defendants.

CONCLUSION

The manner in which the military applies the necessity test to defense requests for expert assistance presents a serious constitutional issue: is a military defendant entitled to the same right to expert assistance in the preparation of his defense as is a federal civilian defendant? This issue strikes at the heart of the military justice system's integrity. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

PHILIP L. SUNDEL
Lieutenant, Judge Advocate
General's Corps
U.S. Naval Reserve
Counsel of Record

STEVEN P. HAMMOND
Major, U.S. Marine Corps

NAVY-MARINE CORPS APPELLATE
DEFENSE DIVISION
Washington Navy Yard
Washington, D.C. 20374-1111
(202) 433-4161

RUTH G. FINN
1827 West Clairmont
Phoenix, Arizona 85015

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